

6 Official Opinions of the Compliance Board 85 (2009)

Notice – Absent evidence suggesting intentional delay, notice provided 5 days before meeting satisfied Act;

Minutes – Procedures – Lag time of almost 4 months violated Act.

January 30, 2009

Donald J. Barnes

Linda J. Barnes

The Open Meetings Compliance Board has considered your complaint alleging that the Poolesville Planning Commission and Board of Zoning Appeals violated the Open Meetings Act in connection with meetings that concerned the issuance of a special exception to allow the operation of an optometry practice in a residential property. For the reasons explained below, we find that the Planning Commission did not violate the Act by failing to provide adequate notice in advance of its February 13, 2008, meeting. However, we find that the Board of Zoning Appeals did violate the Act by failing to make minutes of its June 12, 2008, meeting available in a timely manner.¹

I

Poolesville Planning Commission

A. Complaint

The complaint alleged that the Poolesville Planning Commission violated the Open Meetings Act when the Commission failed to adequately notify the public of a February 13, 2008, meeting at which it made a “critical recommendation to the Board of Zoning Appeals” concerning an application for a special exception. The complaint noted that the Planning Commission holds regularly scheduled meetings and the time and location of these meetings are available on the Town’s website. “However, because of the significance and impact on the community ... and the adjoining neighbors, the Planning Commission had a responsibility to ensure individuals interested, affected or potentially aggrieved ... be heard before making a recommendation to the Board of Zoning Appeals.” According to the complaint,

¹ The complaint set forth two additional allegations, one concerning when a “notice of special exception” sign was posted on the property, the second concerning instructions by the municipal attorney to the Town’s staff concerning certain requests from the complainants. Because it was clear that these allegations were unrelated to the Open Meetings Act, and thus were beyond the jurisdiction of the Compliance Board, we advised that the Town need not address these two allegations in its response.

the lack of adequate notification resulted in the public not having an opportunity to provide input into the decision recommending that the special exception be granted.

B. Response

In a timely response, Alan Wright, municipal attorney for the Town, noted that notice of the Planning Commission's meetings is routinely posted on the Town's website as well as on the Town government bulletin board at a local grocery. In this case, the notice was posted on February 8, 2008, five days before the meeting.

C. Analysis

Before a public body conducts a meeting that is subject to the Open Meetings Act, the public body must give "reasonable advance notice of the session." § 10-506(a).² Whether advance notice is "reasonable" depends on the facts, namely, the interval between the time when a meeting in question is scheduled and notice to the public of the meeting. 5 *OMCB Opinions* 139, 141-42 (2007). As we have previously noted, "[t]he touchstone of reasonableness is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting." 5 *OMCB Opinions* 83, 84 (2006). It is not clear in the record before us when the February 13 meeting was actually scheduled. However, notice was posted five days in advance of the meeting and there is no evidence that either the scheduling or notice was deferred in order to discourage public attendance. Under the circumstances, we find no violation. Cf. 2 *OMCB Opinions* 18 (1998) (posting on Friday in advance of Wednesday meeting satisfied Act).

In terms of the method of giving notice, the Act gives public bodies such as the Planning Commission considerable discretion. § 10-506(c). Here, the Planning Commission routinely provided notice on the Town's website and on a public bulletin board. Either option would have satisfied the Act. Nothing in the Act requires a public body to give individual notice to particular persons. To be sure, laws other than the Open Meetings Act sometimes require notice be given in a specified manner. We are not aware whether that is the case for the Poolesville Planning Commission. However, our role is limited to evaluating allegations under the Open Meetings Act. See, e.g., 3 *OMCB Opinions* 145, 146 (2001) (while other laws may prescribe public hearing requirements as a prerequisite to governmental action, Compliance Board lacks jurisdiction to consider notice requirements beyond requirements of the Open Meetings Act itself.); 4 *OMCB Opinions* 99, 100-01 (2004) (Compliance Board lacks jurisdiction to consider direct notice obligation under other statute).

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

II

Poolesville Board of Zoning Appeals

A. Complaint

The second allegation in the complaint alleged that the Poolesville Board of Zoning Appeals violated the Open Meetings Act because it did not make available minutes of its June 12, 2008, meeting, which concerned the special exception, until October 10, 2008. The complaint argued that this was “an unreasonable amount of time, particularly, compared to previous meeting [*sic*].” The complaint cited as examples meetings held February 28, March 6, and May 22, 2008, when minutes were publicly available much sooner after each meeting, with the longest lag time being 21 days. The complaint alleged that the delay violated § 10-509.³

B. Response

The response acknowledged that the time elapsed before minutes were approved after the June 12 meeting was considerably longer than the time required following the Board of Zoning Appeals’ three previous meetings. The response noted that the Board of Zoning Appeals is a volunteer board that only meets only when there are applications or appeals that require its attention. There were no meetings during the summer of 2008. “[This] may help to explain the discrepancy between the Board’s previously quick turn-around and the longer time over the summer.” However, the Town’s municipal attorney indicated that he has advised the Board that, when no meetings are scheduled, members should review and approve minutes by mail and, if necessary, discuss any discrepancies by phone.

C. Analysis

As acknowledged in the response, the Open Meetings Act requires that written minutes be prepared “[a]s soon as practicable after a public body meets.” § 10-509(b). As a general rule, minutes should be available on a cycle paralleling a public body’s meetings, with the only lag time being that necessary for drafting and review; however, special circumstances occasionally might result in a limited delay. 5 *OMCB Opinions* 14, 17 (2006). As we have previously advised, the “soon as practicable” standard:

permits a public body to take a reasonable amount of time to review draft minutes for accuracy and to approve the minutes.... The Act allows practical

³ The complaint also cited the Town’s municipal charter, the Town’s zoning code, and Article 66B of the Maryland Code. For the reasons mentioned above, we must limit our consideration to the Open Meetings Act.

circumstances to be considered and does not impose a rigid time limit. ...

3 *OMCB Opinions* 96, 98 (2001) (internal citations and quotes omitted). However, we have also cautioned that routine delays of several months would be unlawful. *Id.*; see also 3 *OMCB Opinions* 340, 342 (2003) (six-week delay did not violate Act); 4 *OMCB Opinions* 1 (2004) (15-week delay unreasonable).

In this case, we find that the nearly four-month delay in the availability of the Board of Zoning Appeals' minutes violated the Act. We recognize that when a public body only meets periodically, as the need arises, assuring that the public has access to the minutes of its public meetings in a timely manner poses special challenges. Nevertheless, a public body is "obliged to find a way to meet the Act's requirement that open session minutes be available with reasonable promptness." 4 *OMCB Opinions* at 4. The Board of Appeals should follow the Town's attorney advice to implement a process by which minutes can be approved by mail when a future meeting is not scheduled.⁴

IV

Conclusion

In summary, we find that the Planning Commission did not violate the notice requirements of the Open Meetings Act by failing to provide adequate notice in advance of its February 13, 2008, meeting. However, we find that the Board of Zoning Appeals violated the obligation to make minutes of its June 12, 2008, available in a timely manner.

OPEN MEETINGS COMPLIANCE BOARD

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⁴ Of course, in the event of a discrepancy, care must be taken that the suggested telephone call be handled in a manner so as to not run afoul of the Open Meetings Act.